

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**PC CIVIL APPEAL NO 1 OF 2019**

**(From the decision of the District Court of Karatu in Civil Appeal  
No. 9 of 2018 and originating from Karatu Primary Court in Civil  
Case No. 28/2018)**

**BOAY TLUWAY .....APPELLANT**

**VERSUS**

**PASKALI BAHAS GAMO ..... RESPONDENT**

**JUDGMENT**

**ROBERT, J:-**

The Appellant, Boay Tluway sued the Respondent, Paskali Bahas Gamo in the Primary Court of Karatu at Karatu for breach of contract. After a full trial, the Primary Court decided in favor of the Appellant. The subsequent appeal by the Respondent was partly allowed by the District Court of Karatu. The Appellant was aggrieved by the decision of the District Court hence the present appeal.

Briefly, the Appellant's case was to the effect that, on 15<sup>th</sup> June, 2017 the Appellant and Respondent entered into an agreement whereby the

Appellant agreed to hand over his motor vehicle with Registration Number T557 CMA to the Respondent for business purposes for a period of twelve months with the condition that the Respondent would pay to the Appellant a total sum of Tsh. 15,000,000/= payable in twelve monthly installments of Tshs. 1,250,000/= each. Parties agreed that upon completion of the said payments ownership of the said motor vehicle would be transferred from the Appellant to the Respondent. The contract started on 17/6/2017 and was supposed to end on 16/6/2018. The Respondent managed to pay a total of Tsh. 4,600,000/= only, after three months he defaulted payment for more than five months and the Appellant decided to file a suit against him at the Primary Court of Karatu.

The Appellant's claim at the primary court, according to the records, was originally crafted at a tune of Tsh. 10,400,000/= being the outstanding monthly installments for transfer of the motor vehicle. However, at the commencement of trial, he prayed successfully to amend his claims to reflect the exact figure in respect of his claims against the respondent. He therefore filed his new claims on 11<sup>th</sup> May, 2018. In the short description of his claims he stated as follows:

*"FEDHA NAYO DAI TOKA KWA PASKALI NI TSH 1,250,000/= KWA  
MWEZI MARA MIEZI TISA NA SIKU 27 = 12,000,000/=*

*FEDHA NINAYODAI TSH 7,400,000/=*

*Mdaiwa amevunja mkataba, Aamriwe kulipa gari hilo bila masharti  
yeyote, Aamriwe kunilipa fidia (general damages), Alipe gharama za  
shauri nafuu nyinginezo"*

*Kiasi kinachodaiwa: "7,400,000/=*

My literal translation of the above Swahili excerpt is that:

*"THE MONEY WHICH I CLAIM FROM PASKALI IS TSH.  
1,250,000/= FOR NINE MONTHS AND 27 DAYS =12,000,000/=*  
*THE MONEY I CLAIM IS 7,400,000/=*

*The defendant has breached contract, he should be ordered to  
pay for the motor vehicle without any conditions, an order for  
payment of general damages, he should be ordered to pay for  
costs of this suit and other reliefs".*

After a full trial, the trial court entered judgment for the Appellant (Plaintiff) and ordered the Respondent (defendant) to hand over the motor

vehicle to the Appellant. The court also ordered the Respondent to pay the Appellant a sum of Tsh. 5,400,000/=.

Aggrieved with the decision of the primary court, the Respondent herein appealed to the District Court of Karatu at Karatu on four grounds of appeal. However, the District Court was of the view that the first ground of appeal sufficed to dispose of the appeal and therefore did not deliberate on the rest of the grounds considering them as devoid of merits. The first ground of appeal reads as follows:

*"That the primary court's magistrate erred in law and in facts that he failed to aware (sic) and consider that what (sic) the Respondent's claim in civil case no. 28 of 2018".*

After submissions from both parties, the District Court decided that the issue for consideration is whether the trial court misdirected itself by awarding the reliefs which were not sought. The court made a finding that since the Respondent (Appellant herein) prayed to be awarded Tshs. 7,400,000/= only as special damages, the trial court was not supposed to

award special damages which were not claimed. Based on this finding, the court allowed the appeal partly and issued the following orders:

- 1. An order which required appellant to hand over the motor vehicle to the respondent, an order which required appellant to pay the respondent a total sum of Tshs. 5,400,000/= are hereby quashed, set aside and substituted with an order to the appellant who shall pay the appellant a total sum of Tshs. 7,400,000/=. Respondent is ordered to hand over the motor vehicle to the appellant (if at all he complied with the trial court's order). The reason behind this order is that the actual claim at the trial court was 7,400,000/= following deduction of Tshs. 4,600,000/= earlier made outside court, way back before the institution of the suit. Second, it is indeed unjust to hand over the motor vehicle to the respondent who already received 4,600,000/= installment of his debt to the respondent.*
- 2. The finding that the respondent succeeded to prove his case remain undisturbed*

*3. Each party to take cost of this appeal, since both appeared in person and unrepresented.*

Aggrieved with the decision of the District Court, the Appellant appealed to this court armed with four grounds of appeal which I have reproduced for comfort of reference as follows:

“

- 1. that the district court magistrate erred in law and facts by not considering the submission given by the appellant, the appellate magistrate gave out his judgment basing on one side (the Respondent submission only) an act which is not fair in the eyes of the law.*
- 2. That, the district court magistrate erred in law and in facts by not considering that there was breach of contract caused by the respondent.*
- 3. That, the district court magistrate erred in law and in fact by ignoring and failing uphold (sic) the decision of the Karatu Primary Court (Trial court) as well as to consider that the respondent was*

*the one who breached the contract and not the appellant and the respondent was supposed to pay damages for breach of contract and give back the car to the appellant because there was no contract again between two of them (the appellant and the respondent).*

4. *That, the district court magistrate erred in law and in fact by ignoring the evidence and document tendered by the appellant during the hearing at the karatu primary court (trial court) which shows clear (sic) that the agreed price (consideration) for the contract was 15,000,000/= which was to be paid for one year from 17<sup>th</sup> June, 2017 up to 17<sup>th</sup> June, 2018 (1,250,000/= per month) and the respondent only paid 4,600,000/= the remaining balance was 10,400,000/=. But the respondent defaulted to pay for 6 months and seven days without paying and without informing the appellant of his default. So the respondent was the one who breached the contract”.*

When the appeal came up for hearing on 10<sup>th</sup> March, 2020, both parties appeared in person unrepresented. Parties prayed successfully for the appeal to be argued by way of written submissions.



Arguing his first ground of appeal, the Appellant submitted that, the District Court Magistrate considered the submissions made by the Respondent but failed to consider or ignored his submissions. He blamed the act as unfair in the eyes of the law.

Submitting on the second and third grounds together, the Appellant argued that, the District Court Magistrate failed to consider that, there was a breach of contract on the part of the Respondent as he acted against the agreement. The Respondent was supposed to pay damages and to give back the car as there was no contract anymore.

On the last ground, the appellant argued that, the District Court Magistrate ignored the evidence and the documents tendered at primary court which showed that the agreed consideration was Tshs. 15,000,000/= to be paid within a year. The respondent defaulted for six months and paid only Tshs. 4,600,000/= and the remaining was Tshs. 10,400,000/= was not paid.

Based on the reasons given in his submission, he prayed for the district court's decision to be quashed and the primary court decision to be upheld with costs.



In reply, while not responding directly to the grounds of appeal, the Respondent submitted that, the Appellant's claim at the trial court was only Tshs. 7,400,000/=, he never claimed for a motor vehicle and Tsh. 5,400,000/= as awarded by the trial court.

He submitted further that the Appellant was paid a total of Tshs. 11,250,000/= whereby Tshs. 4,600,000/= was paid through the bank and the other amount, Tsh. 6,650,000/= was paid by cash before the institution of the suit. He faulted the courts below for refusing to recognize the payment of Tshs. 6,650,000/= which he paid in cash without any good reason. He argued that the agreement was silent with regards to the mode of payment. He prayed for the appeal to be dismissed with costs for being devoid of merit.

In rejoinder, the appellant insisted that, the District Court was biased and unfair while the judgment of the trial court was fair as it considered that the Respondent was the one who breached the contract and was supposed to pay damages. He challenged the Respondent's reply submission that instead of challenging the grounds of appeal it was only explaining the judgment of the District Court. He prayed for the appeal to be allowed with costs.

After a careful review of the record and submissions from both parties, this court is of the view that the main issue for consideration is whether or not there was a breach of contract by the respondent (defendant in the trial court) and whether reliefs sought were properly considered and awarded.

It is not disputed that the Appellant and Respondent entered into an agreement (exhibit PI) which gave the Respondent possession of a motor vehicle number T557 CMA and allowed him to use it for business purposes with the condition that the Respondent would pay the Appellant a total sum of Tsh. 15,000,000/= in twelve monthly installments at a tune of Tshs. 1,250,000/= each month. Parties agreed that upon completion of the said payments ownership of the said motor vehicle would be transferred from the appellant to the respondent.

From the evidence on record it is evident that the respondent paid a total of Tsh. 4,600,000/= only for the first three months and twenty seven days as shown in exhibit PII (NMB Customer account statement), he then defaulted payments for five months and seventeen days. There was no evidence in support of the payment of Tshs. 6,650,000/= allegedly made by the Respondent in cash to the Appellant. Based on the default, the trial

court, at page 7 and 8 of the judgment, concluded that there was no contract anymore, the Respondent breached the terms of an agreement and the Appellant is entitled to damages for breach of contract. The actual words in Swahili version reads as follows:

*"kuhusu swali la tatu mahakama imeridhika kuwa mkataba wa wadaawa hauna uhai tena na kwavile mdaiwa ndiye chanzo cha kuvunjika kwa mkataba basi anastahili haki ya lawama ya kuvunja mkataba husika na SMI anastahili fidia za kuvunjwa kwa mkataba kwa mkataba husika toka kwa mdaiwa"*

At the first appeal, the District Court addressed the question of award given to the Appellant by the trial court without addressing the issue of breach of contract which featured in the second ground of appeal filed by the Appellant in the District Court (Respondent herein) as it considered the first ground sufficing in disposing of the appeal while the rest of the grounds are devoid of merit.

Looking at the records, this court is in agreement with the trial court that the Respondent herein breached the terms of the agreement having failed to pay for the monthly installments for more than five months contrary to

the terms of the agreement. According to SM1, having defaulted payments as required by the agreement, the Respondent refused to receive calls from the appellant or accept the proposed settlement. To enforce the monthly payments, the appellant went as far as reporting the matter to police where they were advised to file a civil case in court.

The trial court, having reached a finding that the Respondent was responsible for breach of contract, proceeded to order that the motor vehicle be handed back to the Appellant and the Appellant be paid a total of Tshs. 5,400,000/ as outstanding default payments from the date of the alleged default to the date of filing the suit as well as costs of the case. The Swahili wording used by the court at page 8 of the judgment reads as follows:

*"Fidia anazostahili SMI kwanza arudishiwe gari lake mara moja, i.e. kuanzia sasa, pili alipwe hela zake Tshs. 5,400,000/= za miezi mitano na gharama za kesi mara baada ya siku thelathini za rufaa"*

In appeal, the District Court reached a finding that since the Respondent (Appellant herein) prayed to be awarded Tshs. 7,400,000/= only as special damages, the trial court was not supposed to award special

damages which were not claimed. It therefore quashed, set aside and substituted the orders of the trial court with an order that the Appellant be paid a sum of Tsh. 7,400,000/= only.

After a careful analysis of the evidence on record, judgment of the two lower courts and the submission of parties, this court finds that the trial court having decided that there was no contract between the parties as a result of the breach of contract by the Respondent herein there was no contract to enforce. The Appellant, as an innocent party, had a right to damages for failure by the Respondent to perform the contract. The question for determination is what reliefs the Appellant, as an innocent party, was entitled to.

According to the new claims filed by the appellant on 11<sup>th</sup> May, 2018, the description of his claims from which I have given literal translation from Swahili reads as follows:

*"THE MONEY WHICH I CLAIM FROM PASKALI IS TSH.  
1,250,000/= FOR NINE MONTHS AND 27 DAYS =12,000,000/=*  
*THE MONEY I CLAIM IS 7,400,000/=*

*The defendant has breached contract, he should be ordered to pay for the motor vehicle without any conditions, an order for payment of general damages, he should be ordered to pay for costs of this suit and other reliefs”.*

The agreement between the Appellant and Respondent allowed the Respondent to use the Appellant's motor vehicle for business purposes with a condition that the Respondent was required to pay Tsh. 1,250,000/= every month for twelve months in order for the ownership of the motor vehicle to be transferred to him. The respondent paid for three months only. By the time of filing this suit he was in default of payment for five months and 17 days only which according to the Appellant is equal to Tsh. 7,400,000/=. As the contract period had not come to an end by the time of the suit, the Appellant's prayer for damages was limited to the period of default which is the date of last payment to the date of filing the suit.

The trial court decided that the respondent failed to honour his obligation to contract under section 37 (1) of the Law of Contract Act, (cap.345 R.E. 2002) consequently the Appellant is entitled to take his car back and to be paid damages for the period of the alleged default. However, the trial court restricted payment of damages to Tsh. 5,400,000/= for a period of four



months and ten days only which is within the contract period and the filing of the suit instead of Tsh. 7,400,000/= claimed by the appellant. The Appellant does not challenge the decision of the trial court. He wants it to be upheld.

The first appellate court faulted the trial court's award of damages to the Appellant on the grounds that the said damages were not claimed by the Appellant and further that it was unjust to hand over the motor vehicle to the Respondent (Appellant herein) who had already received Tsh. 4,600,000/= installment of his debt.

Looking at the new claims filed by the appellant on 11<sup>th</sup> May, 2018 at the trial court, it is obvious that the awarded damages were within the claims made by the appellant. The new claims reduced the amount of damages claimed from Tsh. 10,400,000/= to Tsh. 7,400,000/= but it included other reliefs which covers the awards given by the trial court.

This court is not in agreement with the finding of the first appellate court that it was unjust to hand over the motor vehicle to the Appellant herein because he had already received Tsh. 4,600,000/= installment of his debt from the Respondent herein. The contract between the Appellant and the



Respondent having come to an end due to the Respondent's failure to honour his obligation under the contract, the appellant, as an innocent party, was entitled to receive his motor vehicle back and obtain damages for the period which the Respondent stayed with his motor vehicle without payments. The first appellate court should have considered that the agreement between parties allowed the Respondent to use the said motor vehicle for business purposes. It would be unjust for the Respondent who breached the contract to be awarded by the court for that breach by being allowed to obtain the Appellant's motor vehicle for lesser payment than the amount he would have paid according to the agreement had he honoured the contract.

In the result, I allow the appeal with costs, set aside the judgment of the District Court and restore the judgment of the Primary Court.



  
K.N. ROBERT  
JUDGE  
10/7/2020